No. 49075-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LERONE MAJOR, JR
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy
Cause No. 15-1-01100-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Major's defense counsel did not object when a witness referred to Major's spouse as the "victim." Did this constitute ineffective assistance of counsel, and if so, was Major prejudiced by the error?

2. Did the trial court have the authority to suspend Major's misdemeanor sentences?

3. The State is not contesting Major's request that trial costs not be imposed.

B. STATEMENT OF THE CASE

In March, 2015, a domestic dispute arose between the Appellant, Lerone Major, and his wife, Jazmine Graves. RP May 11 at 9.[1] Following the incident, a protective order was instituted, prohibiting Major from having any contact with Graves. RP May 11 at 43-46.

Five months later, Graves, who was seven months pregnant, and Major had an encounter at their former apartment. CP 25. This encounter turned physical, and the Lacey P.D., responding to a 9-1-1 call from Graves, arrived at the scene. RP May 11 at 27-30. Major was taken into custody, but immediately following his arrest, he further violated his no-contact order by making several calls from the county jail to Graves' cell phone, which went unanswered. RP May 10 at 60-61; RP May 11 at 27-30, 57-58. Meanwhile, Graves was taken to a local hospital to ensure there

[1] Citations to the Report of Proceeding ("RP") is according to their date. The RP for May 10 and May 12 are combined and numbered consecutively, so they are referenced collectively as May 10.

were no complications with her pregnancy, at which point Officer Joshua Bartz, of the Lacey P.D., recorded Graves' statement describing the night's events. RP May 10 at 60; RP May 11 at 32.

Although she later recanted much of her statement, Graves provided a disturbing account of the night's events; that Major became upset when she arrived at the apartment; she shoved Major as he was yelling in her face; Major responded by repeatedly striking her in her face, knocking her glasses to the floor; Major took away her phone when she tried to call 9-1-1; Major shoved her into a dresser; and finally he strangled her with one hand while striking her with the other. RP May 11 at 62-75. Graves' recorded 9-1-1 calls described a similar sequence, and both recordings were corroborated by photographs taken of Graves' injuries.[2] RP May 10 at 51-59; RP May 11 at 35-61.

At trial, Graves claimed that she had "blacked out" from anger at the time of the incident, leaving her unable to remember many details, and what she did claim to remember was more favorable to Major than her previous statements, though she acknowledged that she had given police a

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[2] Photographs showed redness and multiple marks around Graves' neck, which Bartz testified was evidence of strangulation; an abrasion on her forearm; and swelling and redness on her cheek where she indicated she had been struck. RP May 11 at 37-42, 76-77. Graves also told Bartz stated that her eye was "leaking" which was attributed to her being struck in the eye. RP May 10 at 62.

different story. RP May 10 at 14. Major also took the stand, where he conceded that he had impeded Graves' breathing, made contact with her face, and taken her phone when she called 9-1-1, but asserted that any violence done to his seven months pregnant wife was merely incidental to his self-defense.[3] RP May 11 at 99-102. The State's key evidence however, were the recordings of Graves' statement to Officer Bartz and her 9-1-1 call, which were both played for the jury during the testimony of Graves and Bartz, and again during the State's closing arguments. RP May 10 at 60-62, 128-149; RP May 11 at 62-75.

Ultimately, Major was convicted of felony assault in violation of a no-contact order,[4] for which he was sentenced to nineteen months in custody, to be followed by one year of community custody. CP 29, 30. In addition, Major was also convicted of four misdemeanors: violation of a no-contact order;[5] interfering with the reporting of domestic violence;[6] and

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[3] At trial, the State emphasized that Major was serving in the Army, presumably giving him the skills and strength to escape from a woman who was seven months pregnant. RP 10 at 126.

[4] Graves' claim that Major struck her in the face, knocking her glasses to the ground was the basis for the felony charge. RP May 12 at 150, 152-53.

[5] The violation of the no-contact order charge arose from Major's phone calls to Graves from county jail following his arrest. RP May 12 at 162-64.

[6] The interference with reporting charge arose from Major's interference with Graves' calls to 9-1-1. RP May 12 at 150, 158-59.

two charges for assault in the fourth degree.[7] CP 25. For each of the misdemeanors, Major received the maximum 364 day sentence, set to run concurrently, but those were suspended for twenty-four months on the condition that Major complete twelve months of community custody. CP 29, 30.

C. ARGUMENT

1. The Performance of Major's Counsel Did Not Rise to the Level of Ineffective Assistance, Nor Was Major Prejudiced By Defense Counsel's Failure to Object When a Witness Referred to Graves as the "Victim."

In his first point of error, Major claims that defense counsel's failure to object when Officer Bartz referred to Graves as the "victim" constituted ineffective assistance, thus necessitating a new trial. App. Brief at 9. Bartz' use of "victim" occurred as he was introducing photos of Graves' injuries,[8] RP May 11 at 37-39, and had defense counsel objected, it likely would have been sustained, since the Motion in Limine did

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[7] The first fourth degree assault charge corresponded with when Major first began yelling and accosting Graves, whereas the second corresponded to the allegation that Major began slapping and shoving Graves after she called 9-1-1. RP May 12 at 150, 151, 153.

[8] The three references to Graves as a "victim" occurred when introducing the photos of injuries. When introducing Exhibit 1, Bartz stated "So this is a close-up photo of the victim Jazmine," when introducing Exhibit 4, he stated "This is another close-up of the victim Jazmine," and finally, when introducing Exhibit 5, he stated "This would be the left side of the neck of the victim Jazmine." RP May 11 at 37-39. Beyond these three instances, there were no other mentions of Graves as the victim.

preclude, referring to Graves as the victim. CP 40. Nevertheless, to require a new trial for such an error would disregard the highly deferential presumption that Major did receive effective assistance, and ignore both the potential tactical reasons for defense counsel's silence, and the substantial evidence against Major.

To prevail on an ineffective assistance of counsel claim, Major has the burden of proving (1) deficient performance by counsel and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The question is whether defense counsel's performance fell "below an objective standard of reasonableness," viewed at the time of the Officer Bartz' testimony. *Strickland*, 466 U.S. at 688-89 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."); *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The presumption is that Major's defense counsel provided effective assistance, unless there is no possible tactical explanation for his actions, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v.*

Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Kolesnik*, 146 Wn. App. 790, 801, 192 P.3d 937 (2008) ("The decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel.").

An examination of the record shows that defense counsel's failure to object does not satisfy either of the *Strickland* prongs, therefore Major's conviction must be affirmed.

a. *Major has not established that Defense counsel provided ineffective assistance, as there are potential reasons why he may have declined to raise an objection.*

Regarding the first prong of the *Strickland* test, Major has failed to establish that there are no legitimate tactical reasons why defense counsel may have declined to object. *Strickland*, 466 U.S. at 689. Although the record provides no clues as to why an objection was not raised when Officer Bartz referred to Graves as the victim, there are several other instances where defense counsel did object when he believed Bartz' testimony violated the Motion in Limine.[9]

[9] Defense counsel successfully objected when Bartz testified that dispatch informed him that Graves had reported being punched by her husband, RP May 11 at 28-29, and when Bartz stated that the incident was being investigated as a domestic violence situation. RP May 11 at 41. Defense counsel also objected unsuccessfully when Bartz testified regarding his

Given that defense counsel did object to other instances of questionable testimony, it is difficult to attribute the complained of conduct to negligence or inattentiveness. Instead, it may simply be that defense counsel did not wish to bring further attention to the use of "victim" by objecting to it. *State v. Kloepper*, 317 P.3d 1088, 1094, 179 Wn. App. 343 (2014) ("The decision to object, or to refrain from objecting even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. It is not a basis for finding counsel ineffective."). Or, it could be that defense counsel did not want to alienate the jury by raising too many objections, and he did not believe the use of "victim" required addressing.[10]

Either of these possibilities is a potential legitimate tactical explanation for defense counsel's silence, and that is all that is required by law. *Strickland*, 466 U.S. at 689. The mere fact that counsel could have objected does not mean he was required to object. Instead the law squarely

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training in recognizing evidence of strangulation, arguing that such testimony violated the Motion in Limine. RP May 11 at 76-77.

[10] Additionally, the cases cited in Major's Motion for Limine concerning the use of "victim" primarily concern the use of "victim" by the trial court or prosecution. *See Jackson v. State*, 600 A.2d 21, 25 (Del. 1991); CP 40. Accordingly, defense counsel may have been more concerned with preventing the prosecution and trial court from referring to Graves as the victim. Thus, while the Motion in Limine was a blanket prohibition on the use of the term, the reference by a witness might not have been a significant concern for defense counsel.

places the burden on Major to establish that no possible tactical explanation exists for counsel's actions, and that burden has not been met. *Id.* Thus, the first prong of *Strickland* is not met, and this claim must be denied. *Id.*

b. Major was not prejudiced by his counsel's failure to object to the use of the term victim.

Next, even presuming defense counsel did provide ineffective assistance, Major has not established a reasonable probability that, but for counsel's failure to object to the term "victim," he would have been acquitted. Therefore it cannot be said that he was prejudiced by the alleged error, and the second prong of *Strickland* is not met. *Strickland*, 466 U.S. at 694-96 ("The defendant must show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.").

Weighing the evidence against Major, it is not reasonable to believe that absent the alleged error, the jury would have had a reasonable doubt as to his guilt. *Id.* Though Graves provided conflicting statements at trial,[11] her statement to Officer Bartz, and her 9-1-1 call were played to the

[11] In light of the other evidence presented, Graves' conflicting testimony at trial is inadequate to create reasonable doubt as to Major's guilt. The two audio recordings were contemporaneous with the assault, and consistent with each other and the photographic evidence. In contrast, her testimony at trial was highly inconsistent and confused. Moreover, Officer Bartz

jury, providing a powerful and harrowing account of the night's events. RP May 10 at 60-62, 128-149. The recordings were corroborated by photos taken at the scene, which according to Officer Bartz' testimony, indicated signs of strangulation and being struck in the face. RP May 11 at 35-61, 62-75. That evidence, combined with Major's admission that he left Graves gasping for air, he took her phone, and knocked the glasses from Graves' face is sufficient to lead a reasonable jury to convict. RP May 11 at 99-102. By comparison, Major's argument that striking, shoving and restricting Graves' breathing was necessary to defend himself, a trained soldier, from his seven-month pregnant wife was not credible, and the jury was free to disregard. RP May 11 at 99-102; *State v. Curtiss*, 161 Wn. App. 673, 696, 250 P.3d 496, 507 (2011) (noting that the jury was free to disregard self-serving witness testimony). Considering all of these facts, it is apparent that Major was convicted due to the strength of evidence against him, and not simply because Graves was referred to as a "victim" three times over the course of a three day trial.

Furthermore, other jurisdictions have taken varying approaches when a party is referred to as a "victim," but rarely have courts found such conduct to be reversible error. Some have held that error only exists when

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testified that her story remained consistent throughout her initial statement, and that she did not appear to have any difficulties with her memory. RP May 11 at 32-33.

"victim" is used by the prosecutor or trial court, *see Jackson v. State*, 600 A.2d 21, 25 (Del. 1991) ("The opinion does not state, nor does it imply, that the use of the term "victim" by witnesses, as a term of art or in common parlance, is a basis for objection."); *Allen v. State*, 644 A.2d 982, 983 (Del. 1994) ("We recognize, however, that when, as here, consent is the sole defense in a rape case, the use of the term "victim" by a prosecutor at trial is improper and to be avoided."), whereas others have held that even if "victim" is used only by witnesses, if the use is pervasive enough, it may still constitute error. *See State v. Cortes*, 84 Conn. App. 70, 851 A.2d 1230, 1239-41 (2004) (finding error when nine witnesses and the prosecutor all referred to the complainant as the victim, despite defense counsel's objections). Nevertheless, the general trend is that only in exceptional cases will a witness' reference to an aggrieved party as "the victim" be sufficiently prejudicial as to require a new trial. *State v. Wigg*, 2005 VT 91, P11, 179 Vt. 65, 70, 889 A.2d 233, 237 (2005) (finding that a detective's use of "victim" was not an opinion concerning the defendant's guilt, stating that "we conclude beyond a reasonable doubt that the jury would not have returned a different verdict had the detective used different and more neutral terminology."); *State v. Nomura*, 79 Haw. 413, 903 P.2d 718, 722-23 (Haw. App. 1995) (holding that the defendant was not prejudiced when instructions referred to the complainant as the "victim");

State v. Rodriguez, 107 Conn. App. 685, 946 A.2d 294, 305-06 (Conn. App. 2008) (holding that the court's use of "victim" did not prejudice the defendant); *People v. Dinapoli*, 2015 COA 9, P32, 369 P.3d 680, 685 (Colo. Ct. App. 2015) (holding that the references to complainant as the "victim" did not cause defendant sufficient prejudice to constitute plain error); *United States v. Gibson*, 690 F.2d 697, 703 (9th Cir. 1982); *State v. Mundon*, 129 Haw. 1, 26, 292 P.3d 205, 230 (2012) ("Notwithstanding the court's error, the use of the term "victim" in the limited circumstances of this case was not prejudicial to Petitioner and, hence, does not itself warrant reversal of his convictions."); *State v. Devey*, 2006 UT App 219, 138 P.3d 90, 95 (2006) ("[W]e conclude that the error, if any, created by one witness's reference to the child as "the victim" was harmless error and shall be disregarded.").

Additionally, although it was barred by the Motion in Limine, the term "victim," is not inherently prejudicial. "Victim" may apply to "anyone who suffers either as a result of ruthless design or incidentally or accidentally." Webster's Third New Int'l Dictionary at 2550 (2002).[12] Whether intentional or not, it is undisputed that Graves was struck, and

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[12] *See also Jackson*, 600 A.2d at 24-25 ("[T]he term "victim," to law enforcement officers, is a term of art synonymous with "complaining witness.""); *Wigg*, 889 A.2d at 236-37 (stating that the testifying detective viewed victim as synonymous with complainant).

suffered injuries, meaning that she was by definition, a victim. Consequently, Bartz' use of "victim" does not, by itself, constitute an impermissible opinion as to Major's guilt.

Finally, juries are presumed to follow the court's instructions, including instructions that the defendant is presumed innocent. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 263, 840 P.2d 860 (1992) (citing *Bordynoski v. Bergner*, 97 Wn.2d 335, 342, 644 P.2d 1173 (1982)). Regardless of Officer Bartz' use of "victim" to describe Graves, the jury was instructed that Major is presumed innocent, and that the State has the burden of proving every element. RP May 12 at 105. Presuming that the jury followed its instructions, any potential harm caused by Officer Bartz' use of "victim" is mitigated by Major's presumption of innocence.

Ultimately, yes, it may be the best standard practice to avoid referring to the complainant as the "victim" whenever possible. Nevertheless, such comments are far from inherently prejudicial, particularly in the present case, where there is substantial and powerful evidence against Major. In relation to that evidence, the potential harm from a single witness referring to Graves as the "victim" is comparatively insignificant. Accordingly, it cannot be said there is a reasonable belief that, but for defense counsel's failure to object, Major may have been acquitted. *Strickland*, 466 U.S. at 694-96. Having failed to meet his burden

under the second prong of *Strickland*, Major's first point of error must be denied. *Id.*

2. The Trial Court Has Discretion to Suspend a Concurrent Sentence.

In his second point of error, Major argues that the trial court lacked authority to suspend the misdemeanor sentences and impose community service, because maximum sentences were imposed.[13] App. Brief at 15. The rationale behind this claim is that suspending the misdemeanor sentences doesn't affect Major's actual time spent in jail, because the sentences run concurrently, but his legal reasoning is based upon an incorrect reading of *Gailus*. *State v. Gailus*, 136, Wn. App. 191, 201, 147 P.3d 1300 (2006).

In *Gailus*, the court imposed a twelve month sentence for felony possession of sexually explicit depictions of minors, and two one year maximum sentences for gross misdemeanors, set to run consecutively with the felony and with each other, for a total of three years in custody. *Id.* Critically, the defendant was given credit for 791 days of time served prior to sentencing. *Id.* The court then purportedly suspended the two misdemeanor sentences, imposing two years of community custody in

[13] It should be noted that the trial court imposed twelve months of community custody for the felony assault charge, thus he will be subject to twelve months of community custody regardless of the misdemeanor charges. CP 30.

their stead, even though the defendant had already served the time. *Id.* Noting that no jail time had actually been suspended, the case was remanded with instructions to vacate the community custody requirements. *Id.*

However, in the present case, Major had not already served his jail term for the misdemeanors at the time they were suspended, nor were any consecutive sentences imposed, thus *Gailus* is clearly distinguishable, and its holding inapplicable. Beyond Major's reliance on *Gailus*, there is no further support for his claim that a trial court lacks authority to suspend concurrent sentences. App. Brief at 16.

More importantly, Major's claim is contrary to the language of RCW 9.95.210 which expressly provides courts with the authority to suspend sentences up to the term of the sentence, or two years, whichever is longer. There is nothing within 9.95.210, or any relevant case law which suggests that the authority to suspend a sentence only applies when sentences are not concurrent. Accordingly, Major's second point of error must be denied.

3. The State Does Not Request Appellate Fees.

Major has requested that appellate fees not be imposed. The state does not contest.

D. CONCLUSION

For these reasons, the State asks the court to affirm Major's conviction.

Respectfully submitted this 10th day of March, 2017.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of March, 2017, at Olympia, Washington.

Cynthia Wright

CYNTHIA WRIGHT, PARALEGAL

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